IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.THANKAPPAN

MONDAY, THE 12TH MARCH 2007 / 21ST PHALGUNA 1928

CRL.A.No. 128 of 2007()

SC.364/2005 of ADDL. SESSIONS COURT (ADHOC)-I, MANJERI
CP.59/2005 of JUDL. MAGISTRATE OF FIRST CLASS COURT, NILAMBUR

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APPELLANT/ACCUSED:

KUTTAPPAN, CONVICT NO. 4186,
CENTRAL JAIL, KANNUR.

BY ADV. BANI.P(STATE BRIEF)

RESPONDENT/COMPLAINANT:

STATE OF KERALA, (THROUGH THE SUPDT. , CENTRAL
JAIL, KANNUR.

BY PUBLIC PROSECUTOR SRI. P. RAVINDRAN BABU.

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 12/03/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

K.THANKAPPAN, J.

CRL. APPEAL NO. 128 OF 2007

Dated this the 12th day of March, 2007

JUDGMENT

This appeal is filed against the judgment in Sessions Case No.364 of 2005 on the file of the Additional Sessions Court (Adhoc)-I, Manjeri. The appellant faced trial for the offence punishable under Section 8(2) of the Abkari Act.

2. The prosecution case against the appellant was that on 8.9.2003, at 6 p.m., the appellant was found in possession of 2 litres of arrack in a black can at Madapally kavu within the limits of Nilambur Excise Range without any permit or licence under the provisions of the Abkari Act. To prove the case against the appellant, the prosecution examined PWs.1 to 4 and produced Exts.P1to P8 as well as MO.1. No oral or documentary evidence was adduced on the side of the defence. On closing the prosecution evidence, the appellant was questioned under Section 313 Cr.P.C. He denied the allegations levelled against him and stated that the case was foisted against him. He also stated that no contraband article was seized from him as alleged by the prosecution. The trial court relied on the evidence adduced by the prosecution and found the appellant guilty of

the offence punishable under Section 8(1) read with Section 8(2) of the Abkari Act, convicted him thereunder and sentenced him to undergo rigorous imprisonment for a period of two years and to pay a fine of Rs.1,00,000/- and in default of payment of fine, to undergo rigorous imprisonment for a further period of six months. The appellant was also given the benefit under Section 428 Cr.P.C. The above conviction and sentence are challenged in this appeal.

3. This appeal is filed through the jail authorities and the appellant is defended by a State Brief. This Court heard the learned counsel appearing for the appellant as well as the learned Public Prosecutor.

4. It is contended on behalf of the appellant that the trial court committed serious error in placing reliance on the evidence of the prosecution witnesses who were excise officials and the only independent witness cited and examined did not support the prosecution case. It is further contended that PW.1 , the Excise Inspector of Nilambur Excise Range violated the provisions of Sections 36 and 53 of the Abkari Act as well as the provisions of the Kerala Excise Manual while conducting search, seizure of the contraband article and taking sample of the same. It is further contended that the trial court ought to have considered the fact

that the material object and the samples were not produced before the court below in time. According to the learned counsel, Exts.P4 and P5 would show that MO.1 and the sample taken from MO.1 were produced before the court only on 18.9.2003 whereas the alleged incident happened on 8.9.2003.

5. The prosecution relied on the evidence of PWs.1 to 4. PW.1 was the Excise Inspector of Nilambur Excise Range. He deposed before the court below that on 8.9.2003 at about 6 p.m. while he was on patrol duty along with PW.2 and other officials, he saw the appellant coming from the opposite direction at a distance of 15 mts. carrying a black can. The appellant was intercepted and on examining the can it was found that the can contained 2 litres of arrack. He further stated that he arrested the appellant as per Ext.P1 arrest memo, took 375 ml. of arrack from MO.1can as sample and seized the contraband article as per Ext.P2 mahazar in the presence of other witnesses. This witness further stated that the appellant and the contraband articles were produced before the court on the next day, but as the Magistrate was on leave due to Onam vacation, the contraband article and sample were taken back to the excise office and thereafter the same were produced before the court on 18.9.2007.

6. The evidence of PW.1 is supported by the evidence of PW.2 who had accompanied PW.1 on the day of the incident. PW.3 was an independent witness who had stated that he had not seen any contraband article seized from the appellant. At the same time, he admits his signature in Ext.P2 mahazar. PW.4, the Excise Inspector continued the investigation, proved Ext.P8 chemical analysis report and filed final charge against the appellant.

7. The questions to be decided in this appeal are whether the evidence adduced by the prosecution is sufficient to prove the case against the appellant and whether PW.1 violated the provisions of Sections 36 and 53 of the Abkari Act and the provisions of the Kerala Excise Manual while seizing the contraband articles, taking samples and producing them before the court.

8. It was the specific case of the appellant that the evidence of PWs.1 and 2 cannot be accepted as PW.3, the independent witness did not support the prosecution case. But, the trial court found that though PW.3 turned hostile to the prosecution, he had admitted his signature in Ext.P2 mahazar. PW.1 had stated in cross-examination that he was not aware of the presence of any independent witness at the time of detection of the

crime, seizure of the contraband article or at the time of taking samples. A perusal of Ext.P2 mahazar would show that it contained the signature of PW.3 and another witness but it cannot be said that those signatures were obtained at the spot itself as spoken to by PWs.1 and 2. PW.3 had deposed that he put the signature in Ext.P2 mahazar at the house of the accused. The presence of independent witness is also doubtful as it has come out in evidence that no signatures were seen either in MO.1 or in the sample taken from MO.1. If that be so, the argument put forward by the learned counsel for the appellant that PW.1 had violated the provisions of Sections 36 and 53 of the Abkari Act and the provisions of the Kerala Excise Manual has to be upheld. The prosecution has not proved the presence of any independent witness at the time of detection of the crime or seizure of the contraband article. Therefore, the appellant is entitled to the benefit of doubt. Further, PW.1 when cross-examined stated that the contraband article alleged to have been seized from the appellant and the sample were not in his custody till those were produced before the court and the prosecution had not adduced any evidence to show that the contraband article and the sample were kept intact in the excise office . In this context, the principle laid down by this Court in the decision reported in **Narayani v. Excise Inspector, 2002(3) K.L.T. 725** is relevant. In the above judgment, this Court had held that it was the duty of the

prosecution to prove that the contraband articles and the samples were kept in safe custody so as to rule out any tampering . Further, this Court in the decision reported in **Dominic v. State of Kerala, 1989(1) K.l.T. 601** held that the provisions of the Kerala Excise Manual have to be followed while conducting search and seizure of contraband articles, taking sample and producing the same before the court without any delay. Any violation of the provisions of the Kerala Excise Manual would create doubt in the prosecution case.

9. In the light of the above legal dictums, this Court is of the view that the prosecution has failed to prove the case against the appellant. In the above circumstances, the judgment under appeal is set aside and the appellant is acquitted. The appellant, accused in Sessions Case No.364 of 2005 on the file of the Additional Sessions Court (Adhoc)-I, Manjeri shall be released forthwith, if he is not wanted in connection with any other case.

The Crl. Appeal is allowed as above.

(K.THANKAPPAN, JUDGE)

sp/

K.THANKAPPAN, J.

CRL.A.NO.128 OF 2007

JUDGMENT

12TH MARCH, 2007.